

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FUTURE-LINK ONLINE, INC.,

Cross-complainant and Appellant,

v.

MICROSOFT CORPORATION,

Cross-defendant and Respondent.

B200771

(Los Angeles County
Super. Ct. No. PC190171)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Barbara M. Scheper, Judge. Reversed.

Ford & Serviss, William H. Ford, III, and Claudia J. Serviss for Cross-complainant and Appellant.

Sidley Austin, Peter I. Ostroff, Michelle B. Goodman, and Anne Mayer Turk for Cross-defendant and Respondent.

For the third time, we review an adverse judgment against cross-complainant Future-Link Online, Inc. (Future-Link), on its claim against WebTV Networks, Inc. (WebTV; now Microsoft Corporation (Microsoft)), for interference with Future-Link's internet service provider (ISP) contract with Futurenet Online, Inc. (Futurenet). Our previous decisions reversed a summary judgment for WebTV, and thereafter a judgment based on refusal to join the real party in interest. Presently, at the time of trial the court decided, as preliminary, legal issue, that Futurenet did not breach its contract with Future-Link by agreeing with WebTV to market internet devices that Future-Link could not service. Absent this asserted breach, Future-Link's claim that WebTV tortiously interfered with the contract could not prevail, and the court rendered judgment for Microsoft. Because we disagree with the trial court's interpretation of the contract, we reverse and remand for a new trial.

FACTS

The facts giving rise to this dispute and its present determination may be gleaned from the pleadings, contracts, and arguments adduced by the parties without apparent dispute. In December 1997, Future-Link, an ISP, entered into a written contract (contract) with Futurenet, a "multilevel marketer" that was selling a type of "set-top box," by which owners could access the internet using their television sets as monitors. The contract, interpretation of which is the heart of this appeal, contained the following provisions material to the present inquiry. (1) The term would be one year, to be automatically renewed unless Futurenet gave notice at least 45 days before its end. (2) Future-Link would provide the following services: (a) furnish "dial in access to all Futurenet subscribers"; (b) "Bill subscribers an access fee of \$19.95 per month"; (c) "Provide to [Futurenet] . . . compensation equal to 32% of monthly fees collected from Futurenet subscribers"; (d) provide, among other things, "facilities for up to five (5) email addresses per subscriber." (3) Future-Link agreed "not [to] provide same or similar network services to any other Multi-level marketing company for as long as contract remains in effect with [Futurenet]." (4) Finally, for its part, Futurenet promised as follows: "Futurenet Online, Inc. shall cause all subscribers current and future [to]

utilize Future-Link online services, and Futurenet Online, Inc. shall not obtain any such services from any other during the term of this agreement.”

Two and one-half months after signing the contract, Futurenet entered into another agreement, with WebTV, which similarly afforded internet access through its own type of set-top box, manufactured by another company (Philips) (WebTV agreement or agreement). This agreement principally provided for Futurenet’s purchase of WebTV’s set-top boxes from Philips, with WebTV if necessary to guarantee those purchases. The WebTV agreement implicitly contemplated Futurenet’s marketing the WebTV box. WebTV already had several ISPs it was using. The agreement thus contained as a final provision: “ISP Status. [WebTV] will allow FutureLink, [Futurenet’s] current ISP, to become a [WebTV] ISP on terms consistent with the terms offered to [WebTV’s] other ISPs that offer comparable service to the service offered by Future Link.”

Future-Link responded to what it perceived as Futurenet’s material breach of the contract by ceasing to provide internet services to Futurenet’s customer-subscribers. Futurenet proceeded to sue Future-Link, for breach of contract and related claims, and Future-Link filed a cross-complaint, which included a cause of action against WebTV and Philips, for interference with the contract. As against WebTV, that cause of action is the sole claim now remaining in the litigation, the rest having been summarily adjudicated or otherwise dismissed. Future-Link’s interference claim alleged that, with knowledge of Future-Link’s contract for exclusive provision of internet services for Futurenet, WebTV had contracted with Futurenet to distribute internet boxes and use ISPs chosen by WebTV.

After the two appellate remands, the cross-complaint came on for trial. The court first ruled on several motions in limine the parties advanced.¹ With the parties’ agreement, the court then determined to try first and separately the issue of whether the

¹ One of these rulings excluded the testimony of two damage experts offered by Future-Link. Future-Link requests review of that ruling if the judgment is reversed. We respond to that request below.

WebTV agreement imported or effected a breach of the contract. (See Code Civ. Proc., § 598.) The court and the parties agreed that this was a question of law, not requiring resolution of conflicting extrinsic evidence. The parties submitted compact briefs, and the matter was argued.

Future-Link relied on Futurenet's promises that it would "cause all subscribers current and future [to] utilize Future-Link online services," and would "not obtain any such services from any other during the term of this agreement." Future-Link argued that Futurenet had breached both obligations by undertaking to sell WebTV's set-top boxes, the buyers of which would be receiving internet service from WebTV's own ISPs. Future-Link further argued that Futurenet's selling boxes that would not be served by Future-Link deprived Future-Link of the intended benefits of the contract, and thus violated its implied covenant of good faith and fair dealing.

Microsoft countered that both Future-Link's prescribed provision of services to "Futurenet subscribers" and Futurenet's duty to cause all "subscribers" to use Future-Link's service did not encompass all Futurenet customers who bought an internet device from Futurenet, but rather extended only to those who "subscribed" to Futurenet's internet or internet access service.

The court agreed with Microsoft. The court distinguished Futurenet's "subscribers" from its customers, as being those who chose to subscribe to Futurenet's internet service, and construed the contract as requiring only such subscribers to use Future-Link's internet service. The court noted that the contract did not spell out requirements for Futurenet to inform or encourage customers of the right to subscribe. Accordingly, Futurenet's agreeing with WebTV to sell its devices, which would be supplied internet service by WebTV's own ISPs, did not breach either the contract or its implied covenant of good faith and fair dealing.

Given this decision, the court concluded, and Future-Link concurred, that the latter could not prevail on its claim of interference with the contract. The court entered judgment for Microsoft.

DISCUSSION

We review the trial court's decision construing Future-Link's contract with Futurenet de novo. (E.g., *E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470.) The contract must be interpreted to effectuate the parties' intentions. (Civ. Code, § 1636.) These are to be ascertained if possible from the writing itself (Civ. Code, § 1639), with the whole contract being taken together, so as to give effect to each part, if reasonably practicable (Civ. Code, § 1641). The meaning of the contract may be explained by reference to its surrounding circumstances, and the matter to which it relates. (Civ. Code, § 1647.)

In this case, the contract called for Future-Link to provide internet service to all of Futurenet's subscribers, and for Futurenet to cause all such subscribers to use Future-Link's services. We agree with the trial court that the meaning and consequent reach of "subscribers" is critical to whether or not Futurenet breached the contract by entering into its agreement with WebTV. However, we find that the language and context of the contract reflect a somewhat different significance of "subscribers," which yields a contrary result on the question of breach.

To begin with, the trial court several times referred to Futurenet's subscribers as consisting of those who subscribed to Futurenet's internet service. This characterization involved a factual misunderstanding. Futurenet was not an ISP, and it did not deliver internet service. The purpose of the contract was for Future-Link to fulfill those functions for Futurenet.

An accurate understanding of "subscribers" would be those who chose to subscribe, not for Futurenet's service but with Futurenet, for internet service. In the context of the contract's three-way relationship – Futurenet, subscribers, Future-Link – subscribers would necessarily mean those who agreed with Futurenet to obtain internet service. What Futurenet undertook in the contract was to provide those subscribers to Future-Link, for rendition of that service.

As a practical matter, the parties contemplated that Futurenet would sell (as it was doing) television set-top boxes, designed and intended to receive and process a household

internet connection.² Most if not all of the buyers would require an ISP, and presumably many or most of them, apprised of what they were buying, would accept Futurenet's offer to subscribe for it.³ They would thus become subscribers, and Futurenet would connect them, figuratively, to Future-Link (and receive, under the contract, about a third of the monthly fees they paid).

Futurenet's decision to begin buying (and selling) WebTV set-top boxes was wholly disruptive of this contractual scenario. The WebTV boxes came with their own, apparently exclusive set of ISPs. A customer who bought a WebTV box from Futurenet would most likely simultaneously subscribe with Futurenet for internet service, but that service would not by necessity be provided by Future-Link. The WebTV agreement recognized that Future-Link was "FOI's current ISP." But the agreement relegated Future-Link to the position of perhaps becoming one of WebTV's other ISPs "on terms consistent with the terms offered to [WebTV's] other ISPs" Futurenet's agreement with WebTV to proceed in this fashion was an anticipatory breach of the contract's provisions for Future-Link's exclusive servicing of Futurenet's subscribers, and perhaps also the reciprocal provision for Futurenet's refraining from obtaining internet services from other ISPs.

The trial court's (and Microsoft's) interpretation of the contract is not greatly different in terms. But it fails to give effect to the manifest intention of the parties, that Future-Link be, as far as Futurenet was concerned, the sole ISP for those who required and sought internet service for the products they were buying from Futurenet. For Futurenet to sell products that excluded Future-Link from provision of internet service was as much a breach of the contract as would be Futurenet's simply not providing an internet subscriber to Future-Link.

² Microsoft agreed that the contract was not limited to set-top devices.

³ That Futurenet would be making such subscriptions available is implicit in the terms of the contract. The absence of specific, compulsory marketing provisions, noted by the trial court, is not significant.

We also disagree with Microsoft's dismissal of the covenant of good faith, and its obligation that a promisor refrain from doing that which will render its performance impossible. (*Pasadena Live v. City of Pasadena* (2004) 114 Cal.App.4th 1089, 1093.) Microsoft argues that "Nothing WebTV or [Futurenet] is alleged to have done rendered performance of the . . . contract impossible," because Futurenet "merely made arrangements to sell the WebTV set-top box." But Futurenet's "arrangements" to sell an internet device for which subscribers would not be routed to Future-Link made performance of Futurenet's contractual responsibilities to that extent impossible.

We therefore conclude that the trial court's resolution of the interpretative issue presented to it was not correct, and that, as properly construed, the contract was breached by Futurenet's entry into its separate agreement with WebTV. The judgment must be reversed, and the case remanded for a new trial in accordance with our decision.

Future-Link also requests that we review and disapprove the trial court's ruling on motion in limine, excluding the testimony of two damage experts. Both of these witnesses proposed to testify that the damages Future-Link suffered comprised not simply the loss of the subscribers it would have had at the end of the one-year term of the contract, and the lost profits Future-Link would thereby have sustained, but rather the value of the subscribers as a component of the sale value of the entire corporation. Because reversal of the judgment erases this ruling and sets it at large, and because the issues will not necessarily arise again, we decline to opine about the evidentiary ruling, on which the judgment did not depend. (Code Civ. Proc., § 906; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 869-870, pp. 928-929; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (Rutter 2007) ¶ 11:65, p. 11-20.)

DISPOSITION

The judgment is reversed, and the matter is remanded with directions to adjudicate that Futurenet breached its contract with Future-Link, and to proceed with trial of the remaining elements of Future-Link's cause of action. Future-Link shall recover costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

BIGELOW, J.